No. 12738

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE, INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division.

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GATEWAY PRINTERS - POCATELLO

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JURISDICTIONAL FACTS.

This is an action to quiet title to real estate situate in Pocatello, Idaho, brought by appellant, a citizen of Idaho against the appellee, a citizen of California. Said real estate was at the time of the commencement of the action and now is of a value of over $3,000.00. The suit was commenced in the District Court of the Fifth Judicial District of the State of Idaho, and removed to the United States District

Court for Idaho, upon appellee's petition. (p. 3, 4, 5). 62 Stat. 930. F. C. A. 28, Sec. 1332.

STATEMENT OF FACTS

For several years prior to January 1, 1947, Jesse M. Chase of Pocatello, Idaho, was engaged in the used car and trailer sales business. As of that date he caused the business to be incorporated under the laws of Idaho, using the name "Jesse M. Chase, Inc." and transferred the entire business to the corporation in exchange for stock. At the time of said incorporation and the transfer of the property to the corporation, he owned and was actively operating 47 markets in eleven different states, namely, 11 in Idaho, 3 in Oregon, 3 in Illinois, 4 in Montana, 6 in California, 3 in Washington, 2 in Nevada, 5 in Wyoming, 6 in Utah, 3 in Arizona, and 1 in New Mexico, all of which were included in the transfer (Plaintiff's Exhibit "10").

Prior to the incorporation, and while Chase was doing business as an individual, appellee's then husband, William H. Musselman, invested in the Chase business by way of what was termed "Jesse M. Chase Investment Certificates",—same being in the nature of promissory notes, which were signed by said Chase personally. Said "Investment Certificates" became the property of appellee, by reason of the death of Mr. Musselman. (p. 47; Exhibit "6")

The mechanics of the transfer of the property of the indi-

vidual, Chase, to the corporation, Jesse M. Chase, Inc., was n the usual form of a written offer incorporated into the ninutes of the corporation, and the acceptance thereof by esolution of the Board of Dircetors. The transfer was made as reflected by the audit and balance sheet as of December 31, 1946, prepared by Crane & Heider, Certified Public Accountants, with offices at Denver, Colorado, subject to the liabilities as verified and contained in said audit including the liability of Jesse M. Chase assumed by reason of the issuance heretofore to various persons of notes designated as 'Jesse M. Chase Investment Certificates'." (Plaintiff's Exhibit "10").

This balance sheet on which the transfer of the Chase properties to the corporation was made, shows a net worth of the properties transferred of $175,377.53 as of the close of business December 31, 1946, which figure constituted Jesse M. Chase's then net worth in said properties (Plaintiff's Exhibit "11").

In exchange for the property of the book net worth of said $175,377.53, the corporation issued to said Chase, common stock of the par value of $164,000.00,—same being 1640 shares of common stock of the par value of $100.00 each (Plaintiff's Exhibit "10"). The balance was subsequently accounted for in additional stock issue and paid-in surplus.

Jesse M. Chase, Inc., the corporation, was organized with three stockholders, namely, Jesse M. Chase, Walter R. Hubble, and I. H. Nelson, each subscribing and paying in, in cash,

$100.00 for a share of common stock (p.77) (Plaintiff's Exhibit "9"). Subsequently and on January 31, 1947, said Walter R. Hubble purchased 20 more shares for $2000.00, and paid for the same by the surrender of cash assets in that amount (p.77).

Among the properties transferred by Chase and wife to the corporation in exchange for stock, was the real estate, which is the subject matter of this quiet title suit, same being, Lots 17, 18, 19 and 20 in Block 235 of Pocatello Townsite, on which is located a one-story stucco building occupying the entire lot space, which is adjacent to the vacant lots described as the North 25 feet of Lot 15 and all of Lot 16 in the same block. The Lots 6 and 7 in Block 267 were vacant lots across the street west of the garage and were used as part of a used car lot.

This real estate was conveyed to the corporation by Warranty Deed executed and delivered by said Chase and wife to the corporation on February 10, 1947, and was recorded in the office of the County Recorder of Bannock County on February 12, 1947, and is in evidence as Plaintiff's Exhibit No. 3 (p.39).

The business was operated under the corporation set-up beginning as of January 1, 1947, and continuing until the date of the receivership, November 5, 1949. During the year 1947 gross sales amounted to $10,979,156.29, and resulted in a gross profit on sales of $1,246,194.55, and a net profit before provision for income taxes of $28,666.94 (Plaintiff's Exhibit "15").

Heavy business losses, totalling $207,813.61, were sustained by the Jesse M. Chase, Inc., corporation during the years 1948 and 1949. The principal items of the loss are set forth in Defendant's Exhibit "6", and are as follows:

"Surplus loss end year 1948 ..... (87,572.53)

Operating Loss—
Stores closed year 1949 ..... (96,320.88)

Operating Loss—
General Office Year 1949 ..... (23,938.20)."

On October 1, 1949, appellee herein, Louise B. Musselman Sisil, as plaintiff therein, obtained a judgment against *Jesse M. Chase*, the individual, in the sum of $10,330.73 on a suit on $14,000.00 face value of Investment Certificates signed by Chase and issued by him prior to the incorporation. This judgment was obtained in the United States District Court for Idaho. *The corporatoin, Jesse M. Chase, Inc., was not a party to said suit.* Transcript of this judgment was filed in the office of the County Recorder of Bannock County, Idaho, on October 15, 1949, and about the same time execution issued on the judgment and levy was made October 31, 1949, upon all the right, title and interest of Jesse M. Chase in and to the real estate, the subject matter of this action, standing on the records of Bannock County in the name of the corporation, Jesse M. Chase, Inc. The United States Marshal went through the formalities of a sale on November 26, 1949. (Plaintiff's Exhibit "4"). Appellant was appoint-

ed Receiver November 5, 1949, which was five days after the levy. (Plaintiff's Exhibit "2"). The U. S. District Court number for said case in which Sisil obtained judgment against Chase is 1539.

At the time this judgment was entered, October 1, 1949, at the time of the filing of the transcript of same with the County Recorder, at the time of the levy and at the time of the sale under execution, of the real estate in question the stock holdings in the corporation, Jesse M. Chase, Inc., were as follows: (Defendant's Exhibit "5"—Plaintiff's Exhibit "8").

Name of Stockholders	Shares of Common Stock	Shares of Preferred Stock
Jesse M. Chase	1716	22
Walter R. Hubble	21	14
I. H. Nelson	1	—
W. G. Ash	20	—
N. M. Anderson	1	11
Lee C. Bloxham	—	30
C. P. Groom	—	10
J. A. Youngren	—	2
Byron S. Dee	—	50
B. W. Briggs	—	60
E. W. Curry	—	1
D. L. Edlefsen	—	47
Crane & Heider	—	11
W. T. Ingram	—	10
George W. Pew	—	9
Total	1759	278

We believe the foregoing constitutes a statement of all the material facts necessary to a determination of this case. However, in view of the filing of an amended answer and counter claim by appellee following the trial (p. 12-18) by permission of the Court (p. 75) we deem it advisable to present the following additional facts:

While the case was awaiting trial the Receiver obtained a favorable opportunity to sell the real estate in question, and in order to meet requirements of the Title Insurance Company and the purchaser, he went through the motions of a redemption of *any* right, title or interest which Jesse M. Chase, may have had in said property, which might have been subject to such execution sale (p. 82, 83, 84). The proceedings appear in the abstract of title in evidence as Plaintiff's Exhibit "4". At the time of the execution and delivering of the assignment of said "right of redemption" and the quit claim deed, neither Chase nor the Receiver considered that Chase had any interest in the property. (p. 71, 85)

HISTORY OF THE CASE.

The original complaint in this action was filed November 16, 1949, in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, in the nature of quiet title action. Temporary injunctive relief to restrain the United States Marshal from making the sale was sought but not granted (p. 41, 42) and amended complaint was filed in the same court on November 28, 1949, and the Marshall dropped as a party defendant. (p. 6, 7, 8).

The cause was removed to the United States District Court for Idaho on appellee's petition (p. 3, 4, 5). Answer to the amended complaint was filed on December 13, 1949. (p. 9-12). The case was tried May 2, 1950. Pursuant to leave granted during the trial (p. 75) appellee filed an amended answer, including two alleged affirmative defenses, and a counterclaim on May 22, 1950.

SUMMARY OF PLEADINGS.

Appellant's amended complaint is in the usual form of a quiet title suit. Appellee's amended answer (p. 12, 13) admits the appointment of the Receiver; the incorporation of the Jesse M. Chase, Inc., corporation; that the record title to the real estate in question was in said corporation, alleging, however, that the property was nevertheless owned by Chase the individual, and if not owned by him that it was held in trust by the corporation for the payment of his debts, and especially appellee's $10,330.73 judgment against him, and that such real estate is subject to the lien of said judgment.

Her first affirmative defense (p. 13, 14) is to the effect that the Jesse M. Chase, Inc., corporation, was organized by Chase, the individual, solely for his own benefit; that it was operated by dummy directors in the employ of Chase; that the transfer of assets by Chase to the corporation was "without any consideration whatever except for the issuance of corporate stock"; that Chase "for all legal intents and purposes" was the owner of all the stock issued by said corporation; that the corporation "assumed the payment of certain Investor

Certificates outstanding and signed by Jesse M. Chase, an individual"; that appellee was owner of such Investors Certificates, and that her judgment against Chase was upon such certificates; that the transfer of the property by Chase to the corporation was in fraud of appellee as a creditor and of creditors generally; that the corporation accepted said real estate as trustee for the benefit of appellee, and that her judgment against Jesse M. Chase is a valid lien upon the real estate held by the corporation.

Appellee's second affirmative defense (p. 15) is to the effect that the real estate in question was sold at Marshal's sale on appellee's judgment against Chase and was redeemed by appellant, after his obtaining assignment of right of redemption from Chase, and that said acts constituted an estoppel of appellant. It further averred that the Receiver had no greater right by reason thereof than the corporation had.

Appellee's counter claim (p. 16, 17, 18) alleges that Jesse M. Chase and Jesse M. Chase, Inc., the corporation, was one and the same person or concern; that her judgment against Chase, the individual, was a judgment against the corporation property of Jesse M. Chase, Inc., by reason of the fraudulent transfer thereof and because of failure of Chase to comply with the Bulk Sales Law of Idaho, in connection with such transfer; that her judgment should be declared to be a judgment against the assets of both Jesse M. Chase and Jesse M. Chase, Inc., and a judgment against Jesse M. Chase, Inc., as of the date of the entry of same, and that the sale from Chase the individual to the corporation be declared a fraud

upon appellee; that she is entitled to a judgment directing appellant to pay the balance due upon her judgment in the same manner as any and all other judgments against Jesse M. Chase, Inc., have been paid.

She prayed relief that appellant's case be dismissed; that the court decree that appellee's judgment to be at all times a valid lien upon the real estate in question, and a valid claim and judgment as of the date thereof against any and all assets and property standing in the name of either Jesse M. Chase, an individual, or Jesse M. Chase, Inc., the corporation; that it be declared a judgment against Jesse M. Chase, Inc., and that the Receiver be required to recognize and pay said judgment the same as any and all other judgments against said corporation have been recognized and paid, and for such other relief as may seem to the court just and proper.

QUESTIONS INVOLVED.

1. Where an individual, while solvent and no fraudulent intent is involved, transfers his property to a corporation which he has formed in consideration of the issuance to him of its capital stock, and others make bona fide investments of $29,900.00 in preferred and common stock of said corporation in the meantime, and the corporation operates at a profit for one year after said transfer and incurs debts and liabilities in the ordinary course of trade, and a judgment is obtained 2 years and 9 months after such transfer by a creditor upon a pre-existing debt of the transferror individual assumed by the transferee corporation, is such judgment, of itself,

effective as against the corporation and its property, without the transferee corporation having been made a party to the suit in which it was obtained?

This question is raised by the pleadings, the evidence, and the decision of the court.

2. Where a redemption is made of real estate by an assignee of the right of redemption, for value, will a deficiency judgment remaining after the sale, be restored as a lien upon said property?

This question is raised by the second affirmative defense of appellee (p. 15), and becomes material only in the event this court concludes that the first question should be answered in the affirmative.

SPECIFICATION OF ERRORS.

I.

The trial court erred in entering judgment for appellee for each of the following reasons:

(a) that appellee's answer, affirmative defenses, and counterclaim do not state facts sufficient to constitute a defense to appellant's amended complaint, or to state a cause of action as a counterclaim;

(b) that the evidence is insufficient to constitute a defense to appellant's amended complaint or to support appellee's counter claim;

(c) that the findings of fact are insufficient to support the judgment, and

(d) that the judgment is contrary to both the law and the evidence.

II.

The trial court erred in finding in its Memorandum Decision (p. 18, 19, 20).

"That he (Jesse M. Chase) was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it."

for the reason and upon the ground that it is contrary to the evidence.

III.

The trial court erred in making each of the fallowing findings of fact:

(b) All of finding of Fact IV.

(b) That portion of Finding of Fact V (p. 23, 24) reading as follows:

> "* * * the said corporation was organized solely for the benefit of the said Jesse M. Chase: that he was,

for all practical purposes the sole and only owner of all of the corporation stock of said corporation, all of the corporate stock of said corporation, having used the names of a few of his employees in the incorporation of Jesse M. Chase, Inc. solely in order to comply with the corporation laws of the State of Idaho, and there was no consideration for the transfer of the assets of Jesse M. Chase, an individual to Jesse M. Chase, Inc., a corporation, and that insofar as the rights of Jesse M. Chase, Inc., and of the defendant herein were concerned, the said Jesse M. Chase remained the owner of the assets transferred to Jesse M. Chase, Inc., and the said corporation held the assets in trust for the payment of defendant's claim."

(c) That portion of Finding of Fact VI (p. 24) reading as follows:

"* * * that the transfer of all of the assets of Jesse M. Chase used in and about the used car business operated by him to said corporation in exchange for corporate stock, issued to said Jesse M. Chase, was a fraud upon the defendant herein,"

(d) That portion of Finding of Fact VI (p. 25) reading as follows:

"* * * that said Jesse M. Chase, Inc., took and accepted the real estate described in plaintiff's Amended Complaint and all of the assets, real and personal transferred to it by Jesse M. Chase, an individual as Trustee for the benefit of this defendant, and that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry was, and is a valid

lien upon the real estate in plaintiff's amended complaint referred to."

(e) All of Finding of Fact IX. (p. 26).

(f) That portion of Finding of Fact X (p. 26) reading as follows:

> "That the said plaintiff herein, the Receiver of Jesse M. Chase, Inc., took over and accepted the real estate described in plaintiff's amended complaint, and took over and accepted any and all other assets of the said corporation, subject to the judgment of Louise B. Musselman Sisil, and against Jesse M. Chase, an individual as aforesaid, * * *"

(g) That portion of Finding of Fact X (p. 26) reading as follows:

> "* * * and that Louise B. Musselman Sisil is entitled to a judgment and decree directing the plaintiff to make payment of any balance due upon her judgment as aforesaid, in the same manner as any and all other judgments entered against Jesse M. Chase, Inc., have been paid by said Receiver."

(h) That portion of Finding of Fact XI (p. 27) reading as follows:

> "* * * and that upon the filing and recording of said abstract of judgment the same became and was a lien upon all of the assets of Jesse M. Chase, Inc., a corportation in accordance with the laws of the state of Idaho."

for the reason that each and all of them are conclusions of law, are unsupported by the evidence, and are contrary to the law and the evidence in the case.

IV.

The trial court erred in making finding of fact VII (p. 25) for the reason that the facts therein found are immaterial, and, in no way constitute a defense or contribute to constituting a defense to appellant's amended complaint, and for the further reason that the same are conclusions of law, not supported by the evidence.

V.

The trial court erred in making Finding of Fact No. VIII (p. 26) for the reason that the facts as found therein or any of them, do not in any way constitute a defense, or contribute to constituting a defense to plaintiff's amended complaint, and are immaterial.

VI.

The trial court erred in making Finding of Fact XII (p. 27) for the reason that the same is a conclusion of law, contrary to both the evidence and the law.

VII.

The trial court erred in making Conclusions of Law Numbered I, II, III, IV, V and VI (p. 27, 28, 29) for the reason that there is no evidence in the record to sustain same, and that each and all of them are contrary to law, and to the evidence.

VIII.

The trial court erred in not entering judgment for appellant as prayed in his complaint for the reason that the evidence establishes a prima facie case for appellant, and there is no evidence in the record sufficient to constitute a defense thereto.

SUMMARY OF ARGUMENT.

Appellee had the option of bringing suit on her "Investment Certificates" against either Chase, the individual, without joining the corporation;

Or against Jesse M. Chase, Inc., the corporation (without joining Chase, the individual,) upon its agreement assuming payment of same,

Or, she could have sued both.

She elected to sue Chase the individual and obtained judgment against him only. Now she tries to subject the corporation property to payment of the judgment by summarily levying upon same and selling it as though it were the property of Chase, the individual.

Appellant takes the position that the transfer from Chase to the corporation was a bona fide transaction, free from fraud, or any other element which would hinder or delay creditors, for the reason that at the time Chase was solvent in the sum of $175, 377.53 (Plaintiff's Exhibit 11) and further that as part of the consideration for the transfer the transferee corporation assumed payment of all debts of Chase in con-

ection with the business and property transferred, including ppellee's.

It is not appellant's contention that the Jesse M. Chase, nc., corporation is not obligated upon the debt to appellee pon the "Investment Certificates" (p. 46), but that so far s the corporation, Jesse M. Chase, Inc., is concerned that the bligation remains in the position of an unsecured claim gainst it, because the judgment did not run against it, by eason of not having been made a party to the suit.

In support of his position appellant relies upon the following statement of the law from 85 A. L. R. Annotation at page 140, as a concise statement of the law applicable to this case:

> "Where the only circumstance relied upon as furnishing the intent to delay or defraud creditors is the fact that the debtor transferred his property to a corporation in consideration of its stock, many courts have refused to declare the transaction fraudulent as having been entered into with intent to delay and defraud creditors, or one without consideration. Such transfers are sustained, in the absence of any actual intent to delay or defraud creditors, which must be deduced from circumstances other than the mere transfer of stock." 85 A. L. R. 140.

Bennett v. Minot, 28 Ore. 339, 39 Pac. 997, 44 Pac. 288.

Re Braus, 248 Fed. 55, 40 Am. Bankr. Rep. 668.

Brill v. W. B. Foshay Co., 65 Fed. (2d) 420.

Bristol Bank & Tr. Co. v. Jonesboro Banking & Tr. Co. 101 Tenn. 545, 48 S. W. 228.

Byrne & N. Dry Goods Co. v. Willis Dunn Co., 23 S. D. 221, 121 N. W. 620, 29 L. R. A. (N.S.) 589.

Carson v. Long-Bell Lumber Corp. 73 Fed. (2d) 397.

Coaldale Coal Co. v. State Bank, 142 Pa. 288, 21 Atl. 811.

Gardner v. Haines, 19 S. D. 514, 104 N. W. 244.

Jordan v. Lynch Land Co., 83 Ind. Ap. 33, 147 N. E. 318.

Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

Kessler v. Levy, 11 Misc. 275, 32 N.Y. Supp. 260, 147 N. Y. 700, 42 N. E. 723.

Kingman v. Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169.

Marine Nat. Bank v. Swigart, 262 Fed. 854, 45 Am. Bankr. Rep. 162.

Maskell v. Alexander, 100 Wash. 16, 170 Pac. 350, L. R. A. 1918C 929.

Persee & V. Paper Works v. Willett, 19 Abb. Pr. (N.Y.) 416, 1 Robt. 131.

Plaut v. Billings-Drew Co., 127 Mich. 11, 86 N. W. 399.

Sayers v. Texas Land & Mortgage Co., 78 Tex. 244, 14 S. W. 578.

Scheck v, Bowne, 113 N. J. 51, 166 A. 189.

Skinner v. Southern Gro. Co., 174 Ala. 359, 56 So. 916.

Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098.

Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441.

Sunderlin v. Terry, 95 Conn. 713, 112 Atl. 642.

Thorpe v. Pennock Merc. Co., 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 299.

"Where no fraudulent intent taints the transaction, a debtor may transfer his property to a corporation, which he has formed, in consideration of the issuance to him of its capital stock, and of that his creditors cannot complain. *The capital stock is as available for the satisfaction of the claim of creditors after the transfer of the merchandise as the merchandise was before.*" (Italics supplied). *Maskell v. Alexander, supra,*

Coaldale Coal Co. v. National State Bank, supra,

"To organize a personal business into a corporation is altogether too common to raise any presumption of fraud." Sunderlin v. Terry, Supra.

A Corporation is an entity distinct from its stockholders.

34 A. L. R. 597 Annotation and cases therein cited.

1 A. L. R. 610 Annotation and cases therein cited.

The Idaho Bulk Sales Law, Idaho Code Sections 64-701-thru 64-705 is not applicable to transfers of real estate.

> "I.C. Sec. 64-702—Whenever any person shall bargain for the purchase in bulk of any portion of stock of merchandise or fixtures otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business or an entire stock of merchandise in bulk or the property, furniture, fixtures, equipment or supplies of a hotel or restaurant, barber shop or other place of business wherein the furniture, fixtures, and equipment are used in carrying on said business, otherwise than in the regular course of trade, for cash or on credit * * * *"

Transfer of stock in trade to corporation for its capital stock does not require compliance with Bulk Sales Law.

> "A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit." *Maskell v. Alexander, supra.*

The burden is on the attacking party to show intent to defraud.

> Rogers vs. Boise Ass'n. of Credit Men, 33 Idaho 513, 196 Pac. 213, 23 A. L. R. 195.

Redemption by Successor in interest takes redeemed property from the lien.

> "One acquiring title, before expiration of period of redemption from original sale, took land free from lien of original judgment under which it was sold." *Evans v. City of American Falls*, 52 Idaho 7, 11 Pac. (2d) 363.

ARGUMENT.

Specifications I, II, III.

The trial court erred in entering judgment for appellee for the reason that appellee's answer, affirmative defenses, and counterclaim do not state facts sufficient to constitute a defense to appellant's amended complaint, or to state a cause of action as a counterclaim.

We first call attention to the part of the answer preceding the first affirmative defense (p. 12, 13), and we find that the appellee has admitted that title is in the Jesse M. Chase, Inc., corporation, and then alleges only the conclusion of law that the said property was owned by Jesse M. Chase an individual, *"and if not owned by said Jesse M. Chase,* is held in trust by the said corporation for the payment of the debts of said corporation" without alleging any facts by way of fraud or otherwise on which to base such conclusion. (Italics supplied)

The allegations in the first affirmative defense eliminate the possibility of any fraud in the transfer of the property from Chase to the corporation, by averring:

> "that the said Jesse M. Chase transferred all of his assets * * * without any consideration whatever except for the issuance of corporate stock * * *"
>
> "that said corporation assumed the payment of certain Investors Certificates outstanding and signed by Jesse M. Chase, an individual, and agreed to pay the same; that the defendant herein was the owner of such Investors Certificates and the judgment heretofore referred to was rendered in her favor in a suit upon such certificates."

without any allegation that said Chase was at the time of said transfer insolvent, or alleging any facts showing that such transfer hindered, delayed or defrauded her.

The second affirmative defense (p. 15, 16) does not state facts sufficient to constitute a defense for the reason that the acts therein alleged appearing on the face of same, occurred after the filing of the amended complaint. This redemption (Exhibit "4") created a new source of title for the Receiver, derived from whatever interest Chase, the Individual, may have had in said property, as the assignment of the right of redemption came directly from Chase to the Receiver as well as the quit claim deed. This was all after the issues in this case had been framed, and we believe that it would constitute an entirely new cause of action in favor of the appellant, which could only be tried out on a new action based upon his acquisition of title from the different source.

Appellee certainly could not claim that a transfer of title from Chase and wife of the property in question, could be

ny fraud upon her, after she had already attempted to sell ll his right, title and interest in it, on execution of her judg- ient.

Under the circumstances the Receiver stands in the posi- ion of a bona fide redemptioner, deriving his right of re- emption, from the party whose right, title, and interest, if any, and appellant contends there was none) was sold t the execution sale.

The case of EVANS V. CITY OF AMERICAN FALLS, 2 Idaho 7, 11 Pac. (2d) 363, has definitely settled this uestion by holding:

> "One acquiring title, before expiration of period of redemption from original sale, took land free from lien of original judgment under which it was sold."

Therefore, it is our position, that in the first place these facts having occurred after the case was at issue, have no bearing on this case, and secondly, that if they do, under the authority cited, the facts clearly show title restored to appellant free from any lien of the judgment. The appellee made her own decision to evaluate the equity of Chase in the property at the amount of her bid, and, should not now be heard to complain that she lost her right to a lien of the deficiency judgment. (This, is assuming that Chase had an interest in the property, which we do not admit.)

The counter claim (p. 16) alleges the false conclusions that the judgment in case 1539 is res adjudicata as to the

appellant and as to Jesse M. Chase, Inc., and that said judgment was in fact ajudgment against Jesse M. Chase, Inc., but at the same time eliminates such statements as facts by alleging that in said case 1539 Louise B. Musselman Sisil was plaintiff and Jesse M. Chase was defendant, without alleging that the corporation, Jesse M. Chase, Inc., was a party defendant t osaid suit, which it was not.

The allegations therein pertaining to non-compliance with the Bulk Sales Law of Idaho, in no way contribute to a valid defense, or toward stating a cause of action on counterclaim.

In the first place the Bulk Sales laws of Idaho are not applicable to transfers of real estate. Sections 64-701 through 64-705 of the Idaho Code. Under our Summary of Argument page 20 of this brief, is set forth the material portion of said statutes, to-wit: Sec. 64-702.

Also the better line of decided cases on this point, hold that such a compliance is not necessary with regard to stock in trade and other personalty included in the Bulk Sale Act.

> "A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit." *Maskell v. Alexander*, supra, 170 P. 350, L. R. A. 1918C, 929.

Appellee in preparing her defense must have been relying upon a presumption that a transfer by an individual of his

sets to a corporation in exchange for stock is, of itself, fraud-ent.

"The good-faith transfer of property to a corporation, even though organized for that purpose, in exchange for its capital stock, is not per se fraudulent, at least unless such transfer has the effect of hindering and delaying creditors. The stock stands in place of the property and is subject to execution." *Carson v. Long-Bell Lumber Corporation*, 73 Fed. (2d) 397, 402. Citing the following cases:

Gardner v. Haines, supra.

Shumacker v. Davidson, supra.

Plaut v. Billings-Drew Co., supra.

Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098.

Sayers v. Texas Land & Mortgage Co., supra.

Bristol Bank & Tr. Co. v. Jonesboro Banking & Tr. Co., supra.

Skinner v. Southern Gro. Co., 174 Ala. 359, 56 So. 916.

Scheck v. Bowne, 113 N. J. 51, 166 A. 189.

In re Braus (C. C. A. 2) 248 F. 55.

Brill v. W. B. Foshay Co. (C. C. A. 8) 65 F. (2d) 420.

The test as set forth in the above cases is, whether or not the transfer, hindered, delayed or defrauded creditors. In this case, the appellee has foreclosed herself from any such situation by alleging in her affirmative defense that the corporation assumed to pay her obligation, so that she had a right to proceed directly against the corporation, if she had so elected.

For the foregoing reasons, we submit that the appellee has not stated a valid defense to appellant's complaint.

The remaining portions of Specification of Error 1, to-wit:

(b) that the evidence is insufficient to constitute a defense to appellant's amended complaint or to support appellee's counter claim;

(b) that the findings of fact are insufficient to support the judgment, and

(d) that the judgment is contrary to both the law and the evidence, are all tied in with Assignments No. II, III, that it would cause this brief to be unnecessarily repetitious if we were to argue them singly at this point.

Taking up Assignment II that the trial court erred in finding in its Memorandum Decision (p. 18, 19, 20) that Chase "was deeply involved, principally by the issuance and sale of these investment certificates and on this account formed a corporation and deeded his property to it": While this, in itself may constitute no official part of the record, it never-

)e-less is the basis for the findings of fact and conclusions of
aw which we have alleged as error, and for that reason we
eem it essential to a proper determination of this case.

We assign as error that it is contrary to the evidence. The
vidence, (Plaintiff's Exhibit 11), shows that at the time
f the incorporation, that the individual, Chase, was in ex-
ellent financial circumstances, and we particularly call atten-
ion to the fact that said Exhibit, being the balance sheet on
vhich said corporation was formed shows him with a net
vorth of $175,377.53. We have carefully examined the record
f testimony at the trial, and we find not a single word of
vidence, that Chase was involved by reason of these certifi-
ates at the time he formed the corporation, or that he formed
he corporation for that reason.

In Argument of that portion of Specification of Error
II, that the court erred in making the finding in Finding IV,
'that the transfer by Jesse M. Chase and wife to the said
Jesse M. Chase, Inc., a corporation of the real estate heretofore
nd in plaintiff's amended complaint described was without
consideration" that it is suffice to say that appellee's alegation
in her affirmative defense (p. 12, 13) *that the consideration was "for the issuance of corporate stock" and that the corporation assumed the payment of certain Investors Certificates, and that she was the owner of such Investors Certificates,"* makes any further comment with regard thereto unnecessary. However, we do desire to call attention to the fact that Plaintiff's Exhibit "10" shows that this transfer was made in consideration of the issuance of stock, and for the further

consideration of the assumption of the payment of these Investment Certificates. Authorities heretofore cited amply cover this.

And as to that portion of finding of Fact V that "the said corporation was organized solely for the benefit of the said Jesse M. Chase; that he was, for all practical purposes the sole and only owner of all the corporation stock of said corporation, having used the names of a few of his employees, solely in order to comply with the corporation laws of the State of Idaho," is contrary to the evidence found in Defendant's Exhibit "5" and Plaintiff's Exhibit "8", and the evidence found in the printed record as testified to by the witness W. R. Hubble at pages 76 to 81.

As to the portion of said finding regarding lack of consideration,—this appears to be a repitition of a prior part of said finding, which we have discussed above.

With regard to the remaining portions of Specification III we feel that no particularly useful purpose can be served by here repeating the assignments, and pointing out, specifically the lack of evidence support them. We take it for granted that the Cour will carefully examine said specified errors, and read the transcript, and exhibits, and that it will be unable to find any evidence supporting any of the facts found.

However, the court will find that most of the so-called findings of fact are nothing but conclusions of law, and we feel that the court can capably judge their character without us having to call the same specifically to its attention.

That the findings are contrary to law, we respectfully refer the court to the authorities quoted and cited in our "SUMMARY OF ARGUMENT" at pages 17, 18, 19 of this brief.

SPECIFICATION OF ERROR IV.

That the court erred in making finding of fact VII (p.). We fail to see, how the appointment of the receiver can in anyway affect appellee's claim to the real estate. She is relying upon a judgment entered on October 1, 1949, transcript of which was filed in the Recorder's office of Bannock County on October 15, 1949, and a levy made on the real estate in question pursuant to execution issued on said judgment on October 31, 1949. The receiver was appointed and qualified on November 5, 1949. It seems to us that she must either stand or fall upon the effectiveness of this judgment, and the subsequent levy and sale thereon after levy of execution, especially in view of the Findings of Fact preceding this one, towit, Finding VI, (p.25) "* * * that the defendant's judgment against Jesse M. Chase in case No. 1539, upon its entry, was and is a valid lien upon the real estate in plaintiff's amended complaint referred to."

After all this is a suit to determine conflicting claims to real estate, and by her pleadings, and by her findings, appellee is relying upon this judgment obtained by her in case No. 1539, as her claim to a superior right to the real estate over the appellant, and again, we call attention to the fact that said judgment was obtained more than a month before the Re-

ceiver was appointed and qualified, and, her levy of executio on the real estate, preceded his appointment.

SPECIFICATION OF ERROR V.

In Finding of Fact VIII the court finds that at the time of the transfer of all of the assets, both personal and real, of his used car business to Jesse M. Chase, Inc., Jesse M. Chase, gave no notice of said transfer to the defendant herein as a creditor, and made no attempt or effort to comply with the Bulk Sales Act of the State of Idaho.

No notice is necessary and in support of this statement we respectfully refer the court to the cases cited in our SUMMARY OF ARGUMENT, pages 17, 18, 19 of this brief.

The Bulk Sales Act of the State of Idaho, does not embrace the transfer of real estate. Idaho Code Section 64-702. See SUMMARY OF ARGUMENT, page 20 of this brief for quotation of material part of said code section.

> "A transfer of stock in trade to a corporation organized to take over the business for its capital stock is not within a statute requiring the giving of certain notice in case of the purchase of a stock in bulk for cash or on credit."

Maskell v. Alexander, supra, 170 Pac. 350, L.R.A. 1918C 929.

SPECIFICATION OF ERROR VI.

Our objection to this finding is the use of the word "sold". We believe we have conclusively established to the

satisfaction of the court, that the real estate could not be legally sold, because it was the property of the Jesse M. Chase, Inc., corporation, at the time of the entry of judgment and levy of execution, and that hence any attempted sale was a nullity.

SPECIFICATION OF ERROR VII.

This is to the effect that all the conclusions of law (p. 27, 28, 29) made by the Court are error for the reason that there is no evidence in the record to sustain them, and that each and all of them are contrary to law, and to the evidence. Again, we take the position that we feel that we would not be particularly helpful to the court by repetitiously going over the evidence, and pleadings, as we again assume that the court, will examine the record, and that upon such examination, it will find no evidence to sustain these conclusions.

In support of our position that they are contrary to law, we again refer the court to the authorities cited in our SUMMARY OF ARGUMENT, on pages 17, 18, 19 of this brief.

SPECIFICATION OF ERROR VIII.

We set forth as error in this specification that the trial court erred in not entering judgment for the appellant as prayed in his complaint. The appellant made a prima facie case (p. 36-40) (Plaintiff's Exhibits 1, 2, 3, 4). We believe we have pointed out that the appellee made no defense either by her pleadings or by the evidence submitted, and as

for the law in the matter, we again refer to the authorities cited in our SUMMARY OF ARGUMENT on pages 17, 18, 19 of this brief.

CONCLUSION.

In conclusion, we respectfully submit that, upon the record and the law as applied to the same that the judgment entered in the District Court should be reversed and the cause remanded to said court with instructions to enter judgment as prayed in appellant's complaint, with costs awarded to appellant.

Respectfully submitted,

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